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Secretary for  
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## Department of Toxic Substances Control

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Arnold Schwarzenegger  
Governor

### TITLE 22

### 45-DAY PUBLIC NOTICE AND COMMENT PERIOD

### PROPOSED REGULATIONS

### AMENDMENT TO LAND USE COVENANTS

**Department Reference Number: R-2006-04**

**Office of Administrative Law Notice File Number: Z-07-0417-04**

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**NOTICE IS HEREBY GIVEN** that the Department of Toxic Substances Control (DTSC) proposes to amend section 67391.1 of California Code of Regulations, title 22, division 4.5, chapter 39. The purpose of recorded land use covenants is to protect the public health and safety, and the environment from contaminated land when there is contamination left in place. The contamination could be from hazardous materials, hazardous wastes, waste constituents, or hazardous substances. DTSC adopted the existing regulation to clarify when it is appropriate for DTSC to require land use restrictions in the form of covenants, and the exceptions for properties that have contamination left in place.

This proposed rulemaking would amend DTSC's regulations to: 1) clarify when it is appropriate for DTSC to require land use restrictions in the form of covenants, and to include a description of the implementation and enforcement provisions necessary to ensure the integrity and long-term protectiveness of the land use covenant; 2) ensure that the regulation applies to site cleanup activities being conducted under DTSC's new brownfields authority of chapter 6.82 of the Health and Safety Code; and 3) for federally-owned property, permit land use covenants to be executed by DTSC and the federal government, or the successor-in-interest to the federal government, during the initial property transfer process, and to be properly recorded.

### PUBLIC HEARING AND WRITTEN COMMENT PERIOD

A written comment period has been established commencing on Friday, April 27, 2007, and closing on Monday, June 11, 2007. DTSC will hold a public hearing on

the proposed regulations at 10:00 a.m. on Monday, June 11, 2007 in Conference Room 210, 2<sup>nd</sup> Floor, 1001 "I" Street, Sacramento, at which time any person may present statements or arguments orally or in writing, relevant to this proposal. Please submit written comments to the contact person listed at the end of this notice. Written comments on the rulemaking submitted no later than 5:00 p.m. on June 11, 2007 will be considered.

Representatives of DTSC will preside at the hearing. Persons who wish to speak are requested to register before the hearing. Pre-hearing registration will be conducted at the location of the hearing from 9:30 a.m. to 10:00 a.m. Registered persons will be heard in the order of their registration. Any other person wishing to speak at the hearing will be afforded an opportunity after the registered persons have been heard.

Due to enhanced security precautions at the California Environmental Protection Agency (Cal/EPA) Headquarters Building located at 1001 I Street, Sacramento, all visitors are required to sign in prior to attending any meeting. Sign-in and badge issuance occur in the Visitor and Environmental Services Center. This Center is located just inside and to the left of the building's public entrance. Depending on their destination and the building security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification cards. Depending on the size and number of meetings scheduled on any given day, the security check-in could take from three to fifteen minutes. Please allow adequate time to sign in before being directed to your meeting.

If you have special accommodation or language needs, please contact Nicole Sotak, Chief, Regulations Section, at (916) 327-4508 or by e-mail at [regs@dtsc.ca.gov](mailto:regs@dtsc.ca.gov) by Tuesday, May 29, 2007. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

In accordance with the California Government Code and Americans with Disabilities Act requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette (etc) as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact Adrian Recio at (916) 324-3095 or by e-mail at [arecio@dtsc.ca.gov](mailto:arecio@dtsc.ca.gov).

## **AUTHORITY AND REFERENCE**

These regulations are being proposed under the following authorities:

Health and Safety Code section 25351.5. This section grants DTSC authority to adopt regulations necessary to carry out its responsibilities, including, but not limited to, regulations governing the expenditure of, and accounting procedures

for, moneys allocated to state, regional, and local agencies pursuant to chapter 6.8.

Health and Safety Code section 25150. This section grants DTSC authority to adopt, and revise when appropriate, standards and regulations for the management of hazardous wastes to protect against hazards to public health, domestic livestock, wildlife, or the environment.

These regulations implement, interpret, or make specific the following:

Health and Safety Code section 25395.99. This section specifies that a response plan pursuant to Health and Safety Code chapter 6.82 may require the use of a land use control that imposes appropriate conditions, restrictions, and obligations on land use or activities, if, after completion of the removal and remedial actions specified in the response plan, hazardous materials remain at the site at a level that is not suitable for the unrestricted use of the site. This section also specifies that if DTSC approves a response plan that requires the use of a land use control, the land use control must be executed by the landowner and recorded in the county where the site is located.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

### **Existing Law**

At contaminated sites, corrective actions and/or removal or remedial actions (also known as “response action”) may be undertaken pursuant to the enforcement authorities of chapters 6.5, 6.8, 6.82, or 6.85 of division 20 of the Health and Safety Code. These response actions encompass all actions that may be taken to address a release or threatened release of hazardous materials, hazardous wastes or constituents, or hazardous substances. Under certain conditions, contamination may remain in place as part of the final response action. Where that occurs, a land use covenant restricting use of the property is typically required to prevent unsafe exposures to contaminants. This regulation covers several chapters under the Health and Safety Code, and types of contamination that may be left in place. The following information is provided to assist in locating where to find some of the definitions for hazardous material, hazardous substance, and types of hazardous waste. This excerpt is from Health and Safety Code section 25260(d). “Hazardous material” means a substance or waste that, because of its physical, chemical, or other characteristics, may pose a risk of endangering human health or safety or of degrading the environment. “Hazardous material” includes, but is not limited to, all of the following: 1) a “hazardous substance,” as defined in section 25281 or 25316; 2) a “hazardous waste,” as defined in section 25117; and 3) a “waste,” as defined in section 470 or as defined in section 13050 of the Water Code.”

Recorded land use covenants contain land use restrictions that can specify requirements or limit the use of real property and affect the title to property. The purpose of recorded land use covenants is to protect the public health and safety, and the environment from contaminated land when there is contamination left in place. The contamination could be from hazardous materials, hazardous wastes, waste constituents, or hazardous substances. In addition to protecting against exposure, land use covenants can help provide information about the property containing contamination to local governments and the public, as well as real estate transaction participants (buyers, sellers, lending institutions, brokers, title and escrow companies). Land use covenants also ensure that long-term mitigation measures or monitoring requirements are carried out and maintained, and ensure that subsequent property owners or lessees have a duty to assume responsibility for any requirements or restrictions pertaining to contamination when they take over the property.

Existing State regulations (Cal. Code Regs., tit.22, § 67391.1) clarify when it is appropriate for DTSC to require land use restrictions in the form of covenants, and the exceptions for properties that have contamination left in place.

#### *California Land Reuse and Revitalization Act of 2004*

Assembly Bill 389 (Stats. 2004, ch. 705) enacts the California Land Reuse and Revitalization Act of 2004 (Act), effective January 1, 2005, that provides liability protections to brownfield developers, innocent landowners and contiguous property owners which are intended to promote the cleanup and redevelopment of blighted or contaminated properties. The bill establishes a process for eligible property owners to obtain the immunities, conduct a site assessment and implement a response action, if necessary, to ensure that the property is ready for reuse. The Act authorizes a response plan to require the use of a land use control that imposes appropriate conditions, restrictions, and obligations, on land use or activities, if contamination will remain at the site at a level that is not suitable for unrestricted use of the property (Health & Saf. Code, § 25395.99). The Act further specifies that if an agency approves a response plan that requires the use of a land use control, the land use control must be executed by the landowner and recorded in the county recorder's office where the property is located.

#### *Federal Property Transfers*

DTSC oversees the investigation and cleanup of contaminated California properties currently or previously owned and operated by the various military branches within the United States Department of Defense (DoD). To ensure that all cleanup work meets environmental regulatory standards, DTSC works directly with DoD and, at some military bases, the United States Environmental Protection Agency (US EPA). One of DTSC's missions is to protect human health and the environment from threats posed by hazardous contamination while facilitating the reuse and property transfer of these

closed military facilities. These properties must be cleaned up to “unrestricted” use (i.e., residential use) or the hazard must be reduced to acceptable levels for other specified “restricted” uses. DTSC recognizes the importance of returning closed military property to economic viability, while protecting public health and the environment during and after reuse and redevelopment activities.

## **Policy Statement Overview**

Objectives: DTSC finds this proposed rulemaking necessary to increase the number of cleanup activities at brownfields sites and former military bases, while protecting public health and safety, and the environment, and to: 1) clarify when it is appropriate for DTSC to require land use restrictions in the form of covenants, and to include a description of the implementation and enforcement provisions necessary to ensure the integrity and long-term protectiveness of the land use covenant; 2) ensure that the regulation applies to DTSC’s new brownfields authority under the Act; and 3) for federally-owned property, permit land use covenants to be executed by DTSC and the federal government, or the successor-in-interest to the federal government, during the initial property transfer process, and to be properly recorded.

## **Proposed Regulations**

These proposed regulations will provide necessary clarifying and conforming amendments to DTSC’s existing regulations for recording land use covenants to protect public health and safety, and the environment from contaminated land when there is contamination left in place. DTSC adopted the existing regulations to clarify when it is necessary for DTSC to require land use restrictions in the form of covenants, and the exceptions for properties that have contamination left in place.

### *Implementation and Enforcement Provisions*

The existing regulation requires DTSC to set forth and define land use restrictions in the form of covenants in a remedy selection or response action decision document prior to approving or concurring with a facility closure, corrective action, Removal Action Workplan (RAW), Remedial Action Plan (RAP), or other similar document when contamination will remain at the property at levels which are not suitable for unrestricted use of the land. The proposed regulation is needed to clarify and give flexibility for more efficient drafting of the implementation and enforcement provisions. In other words, the proposed regulation will allow the implementation and enforcement provisions to be inserted into any document, including the decision document, any supporting enforceable document, the land use covenant, or operation and maintenance agreement. In addition, the existing language could be misinterpreted to require the submission of a separate enforcement and implementation plan. The amendment will

clarify that a separate enforcement and implementation plan is not required. This change will clear up confusion and unnecessary delays in the overall process.

*The California Land Reuse and Revitalization Act of 2004 (Act)*

The existing regulation specifies that DTSC will not certify that a site cleanup has been satisfactorily completed (except for any necessary long-term operation and maintenance activities) until any required land use covenant has been signed by DTSC and the landowner and recorded in the county recorder's office where the property is located. The regulation applies to site cleanup activities being conducted under the authorities of chapters 6.5, 6.8, or 6.85 of the Health and Safety Code, or school sites where DTSC is overseeing the investigation and cleanup actions under the Education Code. The applicable Education Code sections do not lay out the process for remediation. Rather, the Education Code directs DTSC to follow the remediation process pursuant to chapter 6.8 of division 20 of the Health and Safety Code. The proposed regulation is needed to additionally apply to site cleanup activities being conducted under the new authorities of the Act (Health & Saf. Code, ch. 6.82). The proposed regulation will also ensure that DTSC is reimbursed for its costs associated with the administration of such controls at these sites.

*Federal Property Transfers*

The existing regulation addresses situations requiring land use covenants for land owned by the federal government. The regulation requires appropriate land use covenants to be executed by DTSC and the federal agency (property owner) and to be properly recorded before the property can be determined as "suitable for transfer." The existing regulation did not allow land use covenants to be recorded by a successor-in-interest for federally-owned property. This regulation has proven to be too restrictive and limiting. DoD has a policy that limits its ability to enter into land use covenants on federally-owned property. DTSC is experiencing problems with certain federal military facilities when contamination is left in place at federally-owned lands, including military bases, and a land use covenant is required. The proposed regulation would permit land use covenants to be executed by DTSC and the federal government, or the successor-in-interest to the federal government, during the initial property transfer process, and to be properly recorded. This provision is equally protective of public health and safety, and the environment, and will assist DTSC in its ability to obtain recorded land use covenants when contamination is left in place at federally-owned properties. It will also ensure that federal property transfers are executed quickly so these properties can be redeveloped. Redevelopment is viewed by local governments as smart growth, as a valuable economic development tool for creating new jobs, not only for on-site project construction, but also as new sources of revenue that are vital to the local economy.

## **CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE**

The proposed regulations are a project under the California Environmental Quality Act (CEQA). However, they are eligible for an exemption under title 14, section 15061 (b) (3), since it can be seen with certainty that there is no possibility that the rulemaking may have a significant environmental effect. These regulations will not result in potential for significant environmental impacts because they only enunciate the process for restricting contaminated properties and do not set the criteria for site cleanups or determine the levels of contaminants left in place. Therefore, these regulations will not result directly or indirectly in possible adverse physical changes to the environment. The use of institutional controls, including land use covenants, as part of a site remediation or facility closure is a well established practice under State and federal law. A draft of the Notice of Exemption (NOE) is available for review with the rulemaking file and the NOE will be filed with the State Clearinghouse when the regulations are adopted.

## **PEER REVIEW**

Under the provisions of Health and Safety Code section 57004, peer review is not required because the proposed regulations do not establish a regulatory level, standard or other requirement subject to scientific peer review.

## **BUSINESS REPORT**

DTSC has determined that this rulemaking will not require businesses to write a new report, as defined by Government Code section 11346.3(c).

## **FISCAL IMPACT ESTIMATES:**

**Mandates on Local Agencies and School Districts:** DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates.

**Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement:** DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other nondiscretionary costs or savings to local agencies.

**Cost or Savings to Any State Agency:** DTSC has made a preliminary determination that the proposed regulations will have no impact on State revenue or costs. The proposed regulation will ensure that DTSC is reimbursed for its costs associated with the administration of land use controls at sites under the Act (Assembly Bill 389).

**Cost or Savings in Federal Funding to the State:** DTSC has made a preliminary determination that the proposed regulations will have no impact on federal revenue or costs.

**Effect on Housing Costs:** DTSC has made an initial determination that there will be no impact on housing costs.

**Cost Impacts on Representative Private Persons or Businesses:** The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**Significant Statewide Adverse Economic Impact on Businesses:** DTSC has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability to compete with businesses in other states.

**Assessment Statement:**

(A) **Creation or elimination of jobs within California** – DTSC has made a preliminary determination that no jobs will be created or eliminated in California as a result of the proposed regulations.

(B) **Creation of new businesses or the elimination of existing businesses within California** – DTSC has made a preliminary determination that no businesses will be created or eliminated in California as a result of the proposed regulations.

(C) **Expansion of businesses currently doing business in California** – DTSC has made a preliminary determination that no businesses in California will be expanded as a result of the proposed regulations.

**Effect on Small Businesses:**

DTSC has determined that provisions of this rulemaking will not have a significant adverse economic impact on small businesses. These regulations are intended to amend DTSC's existing regulations for requiring land use covenants to be recorded when contamination is left in place. The regulation imposes no new net costs on businesses which may choose to pay the costs of recording a land use covenant based on a variety of factors, such as the cleanup to unrestricted uses may not be the best option due to the extent and nature of contamination, high costs of cleanup, planned use of the property, or technical infeasibility.



## **CONSIDERATION OF ALTERNATIVES**

DTSC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of DTSC would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action. DTSC invites interested persons to present arguments, with respect to the various options, at the scheduled hearing, or during the written comment period.

## **AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS**

Copies of the Notice, Initial Statement of Reasons and the text of the proposed regulations are posted to DTSC's Internet site at <http://www.dtsc.ca.gov> or may be obtained from Ms. Laura Hayashi of DTSC's Regulations Section as specified below. The information upon which DTSC relied is also available at the address listed below.

## **POST-HEARING CHANGES**

After the close of the comment period, DTSC may adopt the proposed regulations. If substantial changes are made, the modified text will be made available for comment for at least 15 days prior to adoption. Only persons who request the specific proposed regulations, attend the hearing, or provide written comments on these specific regulations will be sent a copy of the modified text, if substantive changes are made.

Once regulations have been adopted, DTSC prepares a Final Statement of Reasons which updates the Initial Statement of Reasons, summarizes how DTSC addressed comments and includes other materials, as required by Government Code section 11346.9. Copies of the Final Statement of Reasons may be obtained from Ms. Laura Hayashi at the address listed below. A copy of the Final Statement of Reasons will also be posted on DTSC's Internet site at <http://www.dtsc.ca.gov>, along with the date the rulemaking is filed with the Secretary of State and the effective date of the regulations.

## **CONTACT PERSONS**

Inquiries regarding technical aspects of the proposed regulations or CEQA documents may be directed to Ms. Kathleen Hartshorne of DTSC's Site Mitigation and Brownfields Reuse Program at (916) 323-3395 or, if unavailable, Ms. Cathleen Urbina of DTSC's Site Mitigation and Brownfields Reuse Program at (916) 324-5790. However, such oral inquiries are not part of the rulemaking record.

Statements, arguments or contentions regarding the rulemaking and/or supporting documents must be submitted in writing or may be presented orally or in writing at the

public hearing in order for them to be considered by DTSC before it adopts, amends or repeals these regulations. To be included in this regulation package's mailing list, and to receive updates of this rulemaking, please visit <http://www.calepa.ca.gov/Listservs/dtsc/> and subscribe to the applicable Listserv. You may also leave a message on the DTSC mailing list phone line at (916) 324-9933 or e-mail: [regs@dtsc.ca.gov](mailto:regs@dtsc.ca.gov).

Please direct all written comments, procedural inquiries and requests for documents by mail, e-mail or fax to:

Laura Hayashi  
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Laura Hayashi's phone number is (916) 322-6409. If Ms. Hayashi is unavailable, please call Ms. Nicole Sotak at (916) 327-4508.